No. 80-868

IN THE

Supreme Court of the United States

CATHERINE M. BURWELL, ET AL.,
Petitioners,

v

EASTERN AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR EASTERN AIR LINES, INC., IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly determined that Eastern Air Lines' mandatory maternity leave policy for flight attendants was necessary to the safe and efficient operation of its business and was not a pretext for intentional discrimination.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported but is unofficially reported at 23 F.E.P. Cases 949. The opinion of the district court (Pet. App. B) is reported at 458 F.Supp. 474.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1980. The petition for a writ of certiorari was filed on November 28, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§2000e-2(a) and (e)(1), are set forth at pp. 250a-251a of the petition. (Pet. App. C).

STATEMENT

A. The Contested Policy

The maternity leave policy at issue reads in pertinent part as follows:

> H. Flight Attendants shall, upon knowledge of pregnancy, discontinue flying as a Flight Attendant. Upon request, the company will grant such Flight Attendants leaves of absence for maternity purposes.

This provision has been included in the collective bargaining agreements negotiated by Eastern Air Lines ("Eastern") and the Transport Workers Union since March 21, 1970. (Pet. App. 138a; J.A. 450).[1]

B. The Decision of the District Court

Eastern contended at trial that petitioners had not established a *prima facie* case because pregnancy was only one of a number of physical disabilities requiring removal from flight status for safety reasons. (J.A. 1258B). Eastern also asserted that the mandatory leave policy was a business necessity, and alternatively, that non-pregnancy was a *bona fide* occupational qualification ("BFOQ") for the flight attendant position. 42 U.S.C. §2000e-2(e)(1).

Invoking *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), the district court found that petitioners had estab-

[1] "J.A." refers to the joint appendix in the court of appeals.

lished a *prima facie* case because the mandatory leave policy ". . . imposed on women a substantial burden that men need not suffer." (Pet. App. 197a). The district court then analyzed Eastern's defenses of business necessity and BFOQ.

Applying the business necessity test set forth in *Robinson* v. *Lorillard,* 444 F.2d 791, 798 (4th Cir. 1971), *cert. dis'd.* 404 U.S. 1006 (1971), the district court concluded that Eastern's interest in passenger safety was a sufficiently compelling business purpose to override the discriminatory impact of the policy; further, since all the parties agreed that pregnancy would at some point hinder flight attendants in the performance of their duties and thus compromise the safe and efficient operation of the aircraft, the district court found that the policy also satisfied *Lorillard's* requirement that the practice effectively carry out the business purpose it is alleged to serve. (Pet. App. 203a). The court nonetheless found that Eastern had failed to prove business necessity because it had not chosen "the least restrictive alternative." (Pet App. 203a). The court concluded that ". . . Eastern could accomplish its purpose of assuring passenger safety 'fully well with a lesser differential [sexual] impact' by setting a later date for mandatory maternity leave." (Pet. App. 204a).

The district court next considered Eastern's BFOQ defense. It found that non-pregnancy was a BFOQ for flight attendants twenty-eight or more weeks pregnant, and in individual cases, after twenty weeks of pregnancy. (Pet. App. 215a-216a). Further, because of the risks of miscarriage and other unpredictable disabilities, the court found non-pregnancy to be a BFOQ on flights or flight sequences of more than six hours' duration at any stage of pregnancy. (Pet. App. 213a). For the first twenty-eight weeks of pregnancy, absent a certification of individual in-

capacity, and on flights or flight sequences of a shorter duration than six hours, the district court found the BFOQ defense was not established because ". . . it is possible and practical to determine individually which pregnant flight attendants may not be able to perform their assigned duties adequately due to pregnancy." (Pet. App. 208a-209a).

Even though it was unnecessary given its finding that neither business necessity nor a BFOQ was established for the first twenty-eight weeks of pregnancy, the district court next considered petitioners' claim that the policy was a pretext for discrimination.[2] (Pet. App. 217a). It agreed with petitioners that the policy was pretextual, but it did not apply this finding to invalidate the policy in its entirety. (Pet. App. 217a). Those aspects of the policy which the district court found were justified for safety reasons were not invalidated but preserved in the court's order specifying relief. (Pet. App. 239a-242a).

As a result, the policy was held to be unlawful for some but not all parts of pregnancy, on some but not all flights, and for some but not all flight attendants, the distinguishing factor in each instance being the district court's assessment of the safety risk involved. (Pet. App. 213a, 239a-242a).

C. The Decision of the Court of Appeals

The majority opinion of the court of appeals focused on one crucial factor: whether the petitioners had in fact proved that there were available to Eastern alternative policies which would serve its safety interests equally well with a lesser differential impact. (Pet. App. 24a-26a). This required examination of the district court's finding that setting

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[2] Eastern argued in the court of appeals that the district court's application of a pretext analysis in connection with a BFOQ defense is inappropriate as a matter of law. Because of its disposition of the BFOQ question, the court of appeals did not reach this issue.

mandatory leave at a later date would equally assure passenger safety, and, as a necessary premise to this finding, that individual determination of the ability of each pregnant flight attendant to perform her duties safely and efficiently was feasible. (Pet. App. 24a-26a, 46a).

Prior to reaching this issue, the court of appeals found that a *prima facie* case of disparate impact had been shown and that the business necessity test was the appropriate standard against which Eastern's safety defenses should be measured. (Pet. App. 33a, 35a). It agreed with the District Court's application of the test set forth in *Robinson* v. *Lorillard, supra,* and concurred in its determinations that Eastern's interest in passenger safety was sufficiently compelling to override the discriminatory impact of the policy and that the policy in fact carried out the business purpose which it was alleged to serve. (Pet. App. 45a-46a).

As to the third element of *Lorillard,* however, the court of appeals differed with the district court. The factual premise on which the trial court relied—that pregnant flight attendants likely to suffer disabling incidents can be uniformly identified in advance—was held to be "clearly wrong" by the court of appeals, which observed there was "very little, if any, evidence to support that finding." (Pet. App. 24a-25a). The court of appeals further concluded there was insufficient evidence to support the trial court's legal conclusion that adequate alternative policies existed. (Pet. App. 25a-26a, n. 6, 46a). It accordingly held that:

> Focusing all the evidence at trial through the criteria of *Lorillard* demonstrates that Eastern's policy as it relates to pregnancy after the thirteenth week results from the legitimate business necessity of safely transporting passengers.

(Pet. App. 42a).

The court of appeals also disagreed with the trial court's finding of pretext. It first observed that evidence of pretext in the form of a demonstration of alternative policies was ". . . essentially equivalent to one element of the *Lorillard* business necessity test. . . ." (Pet. App. 47a). Petitioners' failure to prove the existence of equally effective alternative policies in one context obviously precluded them from succeeding in another.

Turning to the question of Eastern's intent, the court found that Eastern had legitimately established the policy.[3] (Pet. App. 54a). Observing that the policy must be judged in accordance with its avowed purpose of promoting passenger safety, the court found that a close scrutiny of the ability of pregnant flight attendants to perform their duties was justified, and that an employer required to make a safety judgment need not display omniscience in order to avoid a legal finding of pretext. (Pet. App. 50a-53a). Rather, the test was met ". . . if all information available to the employer reasonably requires the challenged personnel practice in order to achieve an overriding business purpose." (Pet. App. 54a). Finding that Eastern satisfied this standard, the court concluded that it had not violated Title VII by establishing the policy with discriminatory intent. (Pet. App. 54a).

ARGUMENT

The decision of the court of appeals is correct and is not in conflict with the decision of any other circuit. There is thus no occasion for further review.

I. The decision below is not in conflict with *Moody* v.

[3] The court questioned whether a showing of subjective motivation properly was part of the scheme of proof in a disparate impact case, but found it unnecessary to decide the question. (Pet. App. 47a-48a).

Albemarle Paper Co., 422 U.S. 405 (1975), or with the decision of any other circuit court. The decision of the court of appeals rested upon its finding of failure of proof, not upon a refusal to consider evidence of alternative policies as required by *Moody*. Petitioners' contention that the court ignored their evidence is completely belied by the opinion.

The court of appeals specifically identified the existence of alternative policies as one of the elements of the business necessity test, considered the record evidence, and found it wanting. (Pet. App. 24a-26a, 40a-41a, 46a). It described in detail why petitioners' evidence of alternative policies was insufficiently probative. (Pet. App. 25a-26a, n. 6).[4] It held that the district court's contrary legal conclusion was founded on a factual assumption which was unsupported by the evidence. (Pet. App. 24a-25a).

This treatment of the evidence was in complete accord with *Moody*. Petitioners' real quarrel is with the court's finding that their evidence was inadequate to prove the issue. This presents no conflict with the decision of any other court and no question requiring review.

II. The court of appeals did not apply an incorrect burden of proof in its analysis of the evidence. Contrary to petitioners' contention, this case does not require the Court to consider whether an employer may meet its burden of proving business necessity by showing that it acted reason-

[4] Petitioners' claim that the court failed to consider the policy of Northwest Airlines ignores the larger issue which the court considered and resolved: whether petitioners proved that individual determination of the ability of each pregnant flight attendant to perform her duties provided an equally safe alternative to the mandatory leave policy. Northwest's policy is simply one variant within the larger category of policies based on individual determination. Further, Northwest's practices offered no guidance on the critical issue of performance in an emergency; no evidence was presented that any pregnant Northwest flight attendant had been subjected to an emergency situation. (Pet. 27-28).

ably. The court of appeals applied no such standard, but carefully adhered to the traditional test of business necessity set forth in *Moody* v. *Albemarle Paper Co., supra,* and *Robinson* v. *Lorillard, supra.*

Prior to setting forth its conclusions in detail, the court observed:

> The central issue is whether Eastern's mandatory leave policy is necessary to the safe transportation of passengers as gauged by the criteria announced in *Robinson* v. *Lorillard Corp.* (cit. omitted). . . .

(Pet. App. 14a-15a). Applying each of the *Lorillard* criteria, the court of appeals found that the need for passenger safety overrode the discriminatory impact during the fifteen-week period covered by the court's opinion, that the policy clearly carried out its intended purpose, and that there was insufficient evidence that individual determination of performance would equally accomplish this purpose with a lesser differential impact. (Pet. App. 43a-46a).

This analysis represented a straightforward application of the business necessity test. Nowhere did the court import into its analysis a holding that an employer could meet its burden of establishing business necessity simply by showing it acted reasonably.[5] Nor did it rely upon *Furnco Construction Co.* v. *Waters,* 438 U.S. 567 (1978), to limit its

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[5] The court's discussion of the judicial function in assessing the need for safety policies did not constitute any reformulation of the burden of proof. (Pet. App. 43a-45a). The court simply cautioned that where the question is the necessity of a given policy to safety objectives, a court should not facilely substitute its judgment for the employer's in the absence of evidence that the policy was contrived or discredited. (Pet. App. 44a-45a). Courts should be particularly careful not to intrude into the evaluation of safety risks where the issues are highly complex, involve risk to human life, and are not reducible to mathematical precision. (Pet. App. 43a-45a). *See, Usery* v. *Tamiami Trail Tours, Inc.,* 531 F.2d 224, 238 (5th Cir. 1976); *Harriss* v. *Pan American World Airways,* 437 F.Supp. 413 (N.D. Calif. 1977), aff'd. .... F.2d ...., No. 78-1214 (9th Cir.

evaluation of alternative policies under the business necessity test. The court cited the *Furnco* language quoted by petitioners to illustrate that there are limits to judicial relief in the form of altering business practices. (Pet. 35; Pet. App. 51a). Nowhere in the opinion did the court hold that *Furnco* inhibited its examination of evidence of alternative policies, and the court in fact examined that evidence in considerable detail. *Supra* at 7-8.

Petitioners' contrary arguments are founded on the lower court's discussion of pretext, not business necessity. (See Pet. 30, quoting Pet. App. 53a-54a). The court observed that an allegation of discriminatory purpose could be rebutted by a showing that objective facts "reasonably" required adoption of a particular policy ". . . in order to achieve an overriding business purpose." (Pet. App. 54a).

Petitioners do not challenge this standard in the context of an analysis of pretext. They in fact agree that consideration of the reasonableness of a policy is appropriate where "motive is an essential element." (Pet. 30). Rather, their challenge to the standard is based on its transposition into the consideration of business necessity. This rearrangement was performed by petitioners, not by the court, and inaccurately portrays the grounds for the court's decision.

In sum, petitioners' argument that the court of appeals misapplied the burden of proof is discredited by the opinion itself. It presents no question for review.

III. Petitioners' third argument raises the novel contention that the lower court erred by failing to overturn findings of fact that it found unnecessary to its decision. (Pet. 36). Neither Rule 52 nor any other authority requires the courts of appeals to engage in such a pointless exercise.

Dec. 23, 1980). The court did not find that a court's refusal to second-guess an employer's safety practices resolved the question of business necessity under Title VII; rather, the court went on to analyze Eastern's evidence under each of the *Lorillard* criteria.

Here the court found one factual finding of the trial court to be "clearly wrong." (Pet. App. 24a-25a). It explained in some detail the inadequacies of the evidence upon which the trial court relied. (Pet. App. 25a-26a, fn. 6). It accepted the trial court's other findings, differing only with respect to the legal conclusions to be derived from them:

> We do not otherwise disturb the district court's findings of subsidiary facts relating to the characteristics of pregnancy for it was in the traditional better position to consider conflicting expert evidence than are we. We differ, however, in the legal application of these and other facts to the business necessity defense.

(Pet. App. 25a).

Rule 52 does not apply to the district court's misapplication of the law. *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394 (1947). Further, petitioners can hardly claim injury as the consequence of the court of appeals' failure to overturn findings of fact made in their favor at the trial court level.

Petitioners' additional contention, that the court of appeals violated Rule 52(a), Fed. R. Civ. P., by rejecting the trial court's findings as to the predictability of pregnancy-related disabilities (Pet. 36-38), is nothing other than a disagreement with the court of appeals' assessment of the sufficiency of the evidence. Rule 52 does not require a reviewing court to accept findings of fact unsupported by the evidence or to respect conclusions of law which do not properly rest on the facts so found. *Campana Corp.* v. *Harrison*, 114 F.2d 400, 405 (7th Cir. 1940).

In *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 534-35 (1979), this Court found no basis for the petitioner's challenge to a ruling of the court of appeals similarly based on the insufficiency of the evidence. There the

issue was the existence of a dual school system. The district court's finding that no such system existed was overturned as clearly erroneous by the court of appeals, which found that the Board "...had responded with insufficient evidence to counter the inference..." that a dual system had been in operation. 443 U.S. at 534. In rejecting the petitioner's challenge to this holding, this Court held that under the clearly erroneous standard.

> . . . the role and duty of the Court of Appeals are clear: it must determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are. The Court of Appeals performed its unavoidable duty in this case and concluded that the District Court had erred. . . . We see no reason on the record before us to upset the judgment of the Court of Appeals in this respect.

443 U.S. at 534-35.

The *Brinkman* analysis is equally apt here. The court of appeals unquestionably followed the "clearly erroneous" standard of Rule 52. Petitioners' quarrel with its conclusion does not raise any question requiring review by this Court.

IV. There is no occasion for this Court to resolve contradictory decisions in the lower courts because there is no conflict among the circuits. The Ninth Circuit has recently affirmed a decision upholding a Pan American maternity policy which is similar to Eastern's. *Harriss* v. *Pan American World Airways, Inc.*, ... F.2d ...., No. 78-1214 (9th Cir. Dec. 23, 1980). The cases cited by petitioners as creating a conflict are decisions of district courts which have not been resolved by the appellate courts, are not final judgments, or were subsumed within the decision of the court of appeals below.[6]

[6] The decision in *In Re National Airlines*, 434 F.Supp. 249 (S.D. Fla. 1977), represents only the liability phase of a bifucated proceed-

Nor does petitioners' claim of "inconsistency" within the Fourth Circuit provide grounds for review. (Pet. 43). The propriety of a BFOQ defense where a mandatory leave policy was at issue was not addressed in *Condit* v. *United Airlines, Inc.*, 558 F.2d 1176 (4th Cir. 1977), *cert. den.* 435 U.S. 934 (1978).[7] The question was considered and resolved for the first time by the court of appeals *en banc* in the instant case. Most importantly, whether a BFOQ defense properly applies is not a question presented by the petition. Petitioners do not contend that the court erred in failing to apply the BFOQ test. Their assertion that decisions within the Fourth Circuit are inconsistent on a point not alleged to have been erroneously decided does not raise an issue requiring review.

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ing, the court reserving the damages question for another trial. 434 F.Supp. at 266. The case has not been reduced to final judgment susceptible to appeal. *McLennan* v. *American Airlines*, 440 F.Supp. 466 (E. D. Va. 1977), was originally joined with this appeal for *en banc* consideration but was settled prior to oral argument. *Airline Pilots Association* v. *Western Airlines, Inc.*, 22 EPD §30,636 (N.D. Calif. 1979) is on appeal in the Ninth Circuit.

[7] In *Condit*, a three-judge panel affirmed as not clearly erroneous the trial court's finding that United's mandatory maternity leave policy was lawful.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 31, 1980

CERTIFICATE OF SERVICE

I, Paul M. Thompson, Counsel for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari in the United States Mail, first class postage prepaid, this 31st day of December, 1980, addressed to: Robert B. Wallace and Jay L. Westbrook, Surrey & Morse, 1156 15th Street, N.W., Washington, D.C. 20005; Lawyers' Committee for Civil Rights Under Law, 733 15th Street, N.W., Suite 520, Washington, D. C. 20005.

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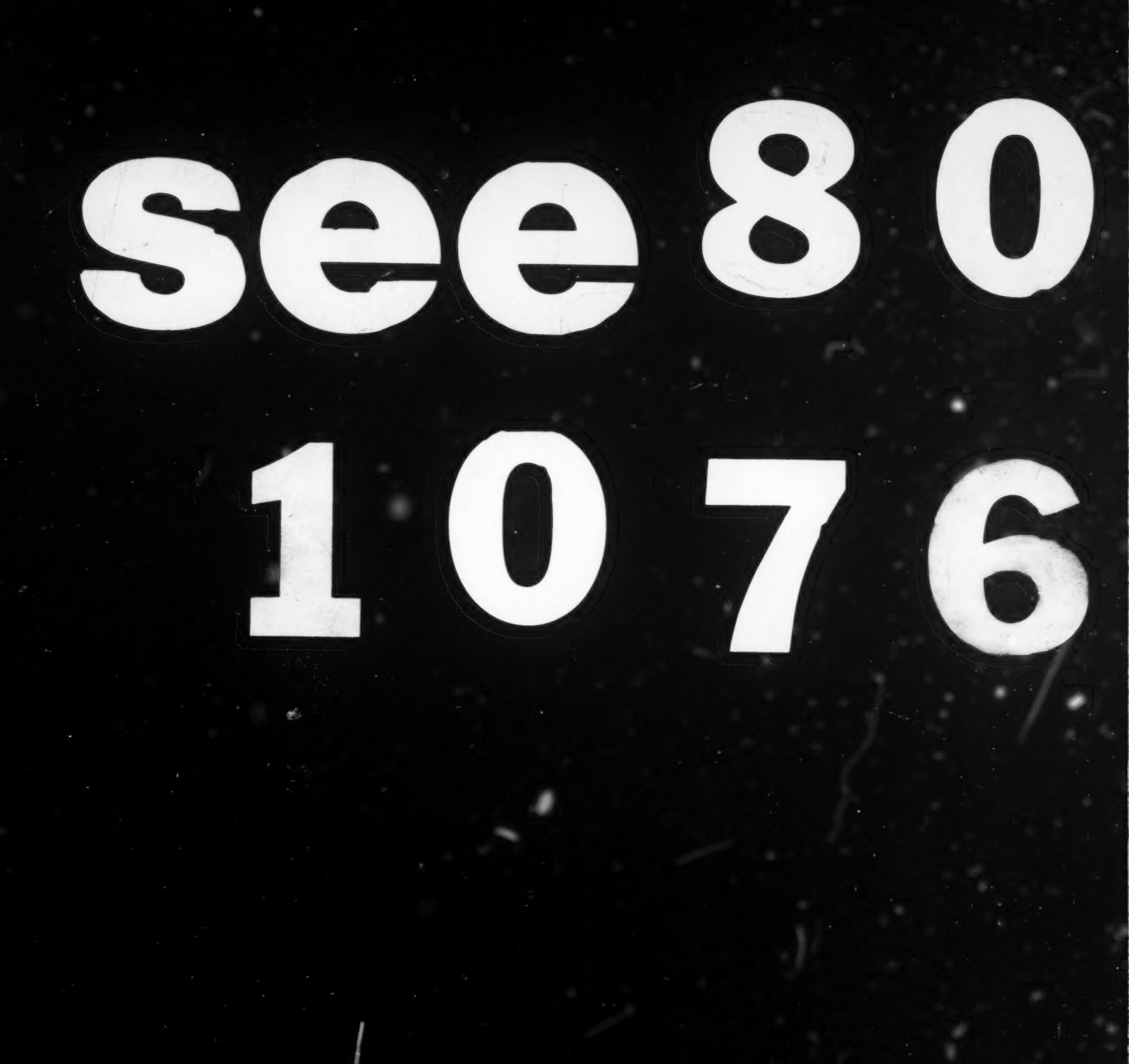
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